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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL GUESS,

Defendant and Appellant.

B292000

Los Angeles County  
Super. Ct. No. YA097828

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Edmund Willcox Clarke, Jr., Judge.  
Affirmed as modified.

Maser Law Group and Caneel C. Fraser, under  
appointment by the Court of Appeal, for Defendant and  
Appellant.

Xavier Becerra, Attorney General, Lance E. Winters,  
Chief Assistant Attorney General, Susan Sullivan Pithey,  
Assistant Attorney General, Steven D. Matthews and Analee J.  
Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant and appellant Michael Guess of felony evading—fleeing a pursuing peace officer’s motor vehicle while driving recklessly—as well as two misdemeanors. On appeal, Guess contends the trial court violated his constitutional rights by (1) failing to conduct a *Marsden*<sup>1</sup> hearing at the outset of his jury trial, and (2) imposing a restitution fine and court fees without assessing his ability to pay them. In a supplemental letter brief, Guess asserts his one-year enhancements for prior prison commitments must be stricken in accordance with Senate Bill No. 136 (SB 136). We find no error in the trial court’s handling of Guess’s request to discharge his counsel and its assessment of fines and fees. We modify Guess’s sentence by striking the one-year prison priors and, as modified, affirm the judgment.

## **FACTS AND PROCEDURAL BACKGROUND**

### **1. *Guess takes items from Fry’s and flees from police***

As Guess does not challenge the sufficiency of the evidence at trial, we summarize it only briefly.

On March 9, 2018, Juan Zuniga was working as a loss prevention officer at a Fry’s Electronics store in Manhattan Beach. Zuniga saw a man later identified as Guess “quick selecting merchandise from the software department,” then taking two tablets from the computer department. Guess then “selected a backpack” and put the merchandise in it. Zuniga called the Manhattan Beach Police Department.

Officer Michael Lynch was dispatched to the store. Lynch saw a man who matched the description of the suspect driving a blue Toyota Prius in the Fry’s parking lot. Lynch tried to stop the Prius, turning on his patrol car’s overhead lights and

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<sup>1</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

forward-facing red light. The Prius—which had no license plates—didn’t stop. The Prius drove out of the parking lot, going about 50 miles per hour. At trial, Lynch identified Guess as the driver.

Lynch’s dashcam recorded the ensuing pursuit; the prosecutor showed the video to the jury at trial. Guess violated a number of traffic laws, crossing double yellow lines, changing lanes in an intersection, driving 60 miles per hour in a bike lane, and running red lights, one at 80 miles per hour. Lynch already had turned on his lights; he also turned on his siren. Pedestrian traffic in the area was heavy. Lynch thought Guess “was going to cause a head-on collision to opposing traffic.” Lynch finally was able to stop Guess using a “pursuit intervention tactic” maneuver.

Police called Zuniga to the scene. He identified Guess as the man he’d seen take the items from Fry’s. Police found the Fry’s merchandise in the Prius. The value of the items totaled \$836.25. The officers returned the merchandise to Zuniga. Police also found two personal checks in the Prius. The checks were later determined to have been stolen from a car owned by Michael Batty. One check was a donation to Batty’s church for a Sunday school ministry for developmentally disabled individuals. The other check was a gift from Batty’s grandmother.

## **2. *The charges and pretrial proceedings***

The People charged Guess with one count of felony evading (“fleeing a pursuing peace officer’s motor vehicle while driving recklessly”) and three misdemeanors: shoplifting, theft of identifying information, and receiving stolen property worth \$950 or less. The People alleged Guess had suffered a prior strike for

robbery and five prison priors<sup>2</sup> under Penal Code section 667.5, subdivision (b).<sup>3</sup>

At arraignment on March 14, 2018, the court appointed counsel for Guess. At the next court date on March 28, counsel told the court that Guess had “expressed a desire to go pro. per. when I spoke to him in lockup.” The court cautioned Guess about the dangers of self-representation. Guess replied, “I’m not new to this or nothing. You know I’ve been to trial four times as pro. per. I actually beat a case 2016 [sic] that I was exposed to 27 years. And you know I heard the same thing from each judge.”

The court asked Guess if was making a *Marsden* motion. He confirmed he was not. Guess then completed the *Faretta*<sup>4</sup> advisement and waiver form. The court granted Guess’s motion to represent himself. The court told Guess it would order him out from the jail for the next day to pick up his discovery.

Guess didn’t come to court the next day (March 29) nor the following court day (April 2). He appeared on April 3 and was given discovery.

Guess’s preliminary hearing was set for April 12, 2018. Guess didn’t arrive at the courthouse until between 11:15 and 11:30 a.m. Guess told the court he wasn’t ready. After a long colloquy with Guess, the court denied his oral motion to continue, finding Guess was “being dilatory.” The court noted the People’s witnesses had “been waiting here all morning” and Guess had neither filed a motion to continue nor “expressed with any

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<sup>2</sup> The prosecution later amended the information to allege three rather than five prison priors.

<sup>3</sup> References to statutes are to the Penal Code.

<sup>4</sup> *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

specificity his claim” that he needed more time to prepare “an affirmative defense.” At the conclusion of the hearing, the court held Guess to answer and set arraignment for April 26, 2018.

The court’s docket reflects Guess was a “refusal” on April 26 and a “miss-out” on April 27. On April 30, 2018, Guess appeared in court and asked to continue his arraignment for 30 to 60 days. The court denied the motion.

Guess did not return to court until May 8, twelve days after his scheduled arraignment. The court (Judge Eric C. Taylor) told Guess, “Mr. Guess, you have had a number of failures to come to court. I think about six at this point, maybe seven, and I’ve issued three, four, five—five orders to have a sheriff remove you with reasonable force if necessary.” Guess said he’d been “healing from surgery” and getting eye drops. Guess added he had “insomnia” from “pain in [his] mouth.”

Judge Taylor advised Guess he couldn’t “come whenever you want to come.” The bailiff told the court Guess had been coming on “the noon bus” rather than the morning buses. Guess said, “All I want to do is file my 995. My due process rights have been violated numerous, numerous times.” Judge Taylor explained, “We’ve been calling you out to court every day to arraign you to inform you of the charges against you and your rights. When you don’t make the bus and you don’t come, we can’t do that. So, you have been sitting in jail for 11-plus days without being arraigned, which is not okay because it hurts your ability to get to trial.” The court arraigned Guess and set May 24, 2018, as the next court date.

Guess returned to court for pretrial conferences on May 24, June 1, June 7, June 12, and June 18. On June 1 Guess didn’t arrive until 11:40 a.m. The court told him, “The calendar call is at 8:30. That’s when you’re supposed to be here in the morning. That’s when all the other litigants come. . . . The afternoons are

meant for other things like trials.” The court said, “Your private investigator was here this morning waiting for you. You weren’t here.” The court warned Guess he could lose his pro. per. privileges if he continued to fail to come to court on time.

On June 7 the court noted Guess was “on the second bus again.” On June 12, Guess arrived at 2:15 p.m. Judge Taylor told Guess that both stand-by counsel and the investigator had been there since 8:30 a.m. The court asked Guess, “You didn’t wake up in time to catch the bus?” Guess replied, “Not the first one, I guess.”

On June 18 the court called the case at 10:30 a.m. The court stated, “Mr. Guess has again missed the bus. . . . We’ll have him at 2:15.” The court noted the investigator had been there since 8:30 a.m. That afternoon, Guess told the court he didn’t know what time he woke up that morning. The court said, “Here we are at almost 3:00, and here we are again.” The court trailed the matter to the next day at 8:30 a.m.

Guess appeared in court the next afternoon, June 19. The court stated it was going to set a hearing for June 28 about the “great number of occasions” Guess had not been there in the morning “or not appeared at all when he’s ordered to be out.” The court read from jail reports that Guess had “caused a delay of operations by refusing to go to court. Deputy personnel spoke to inmate Guess several times in an attempt to remind inmate Guess of his court, and he stated, ‘I don’t give a fuck.’” The court told Guess he could cross-examine the deputies at the hearing.

Referring to the deputy, Guess said, “He’s full of shit.” Guess apparently stood up, as the court said, “Now you’re to sit back down. Sit back down.” Judge Taylor ordered Guess removed from the courtroom. As he left, Guess said, “Dumb ass.”

Guess next appeared before the court at 11:55 a.m. on June 28, 2018. Guess’s investigator as well as an officer witness

had been waiting since 8:30 a.m. Guess said he “didn’t [get] up early enough” to get on the bus. Requiring the court staff to work into the noon hour, the court took testimony about why Guess repeatedly failed to come to court on time. The deputy testified he had “notified [Guess] multiple times” but Guess “refuses to show up to court on time.” Guess cross-examined the deputy. Guess then told the court, “[Y]ou made a mockery of your own courtroom” and the hearing was a “circus.” The court told Guess if there was a medical reason he couldn’t come to court on time, “fine,” but that he had been “voluntarily absenting [him]self from the court almost every morning.”

On the next court date—July 2, 2018—Guess arrived at the courthouse at 11:30 a.m. Judge Taylor read into the record the letter medical personnel at the jail had sent, stating “[t]here are no health conditions preventing the patient from appearing in court on time.” The court set the next date for July 10.

On July 10, Guess failed to come to court. Nor did he appear on July 19. On July 20, Guess appeared in court at 2:00 in the afternoon. Citing Guess’s “chronic failure to appear” in court and his “lengthy and consistent history of disruptive behavior,” the court revoked Guess’s pro. per. privileges and assigned the lawyer who had been serving as standby counsel to represent him in the case.

Guess had filed an affidavit to disqualify Judge Taylor under Code of Civil Procedure section 170.6. Judge Taylor granted Guess’s disqualification motion and the case was reassigned to another judge.

On July 26, 2018, the court (Judge Hector M. Guzman) set Guess’s case for jury trial on July 30. Defense counsel said that, except for difficulty accessing some video evidence, the defense was ready. Judge Guzman admonished Guess that any refusal to

come to court would mean he was voluntarily absenting himself from the court proceedings and waiving his appearance.

**3. *With jurors waiting, Guess asks for “a Marsden hearing,” then absents himself from court and abandons the request***

The case was assigned to Judge Edmund Willcox Clarke, Jr., for trial. That morning—July 30, 2018—Judge Clarke noted Guess was “not in the courtroom and not yet in our building.” Having looked at the file “for a few moments,” Judge Clarke said, “I see that refusing to come to court has been a recurring issue with Mr. Guess.” The court proposed handing out questionnaires to the prospective jurors and ordering them back for 1:30 p.m. Counsel agreed and the court did so.

Guess was in court in the afternoon. The court asked, “Are both sides ready to start the trial?” Defense counsel answered affirmatively, as did the prosecutor. The court already had provided some of the completed juror questionnaires to counsel. The court explained the process for seating the jurors and questioning them.

Guess interrupted the judge, asking, “Your Honor, may I be heard?” The court answered, “In a moment, sir.” The court finished its sentence about seating the jury and then told Guess that perhaps his counsel should speak for him. The court asked, “Did you want him to tell me what you had in mind or did you want to address me yourself?” Guess replied, “I want to address you myself.” The court said, “All right. What did you have to say?” Guess responded, “I want to be heard on a *Marsden* hearing, first and foremost.”

Guess then began to speak at length about a petition for writ of mandate he’d filed and a section 995 motion he’d wanted heard, adding, “My rights are being violated all the way through and I need to address that.” Then Guess started talking about



a suppression motion he'd wanted heard, as well as a *Pitchess* motion.<sup>5</sup> Judge Clarke asked Guess a number of questions about the suppression motion, explaining why it would be unsuccessful.

Eventually, Guess repeated, "I want to be heard on a *Marsden* hearing." The court replied, "After we talk to the jury for a while, we can do that." The court then asked Guess, "When did you first make the court aware you had a *Marsden* issue?" Guess complained that he hadn't been allowed to speak to Judge Guzman. Guess then told Judge Clarke, "See, you are already prejudiced. You don't even know me."

Guess continued to argue with the court. Judge Clarke asked, "How much time do you need to talk to me today?" Guess replied, "Come on, man. This is crazy." The court told Guess, "I will sit back and listen, but I want to know when you are done so I can get the jury in here." Guess continued to argue and to accuse the judge of "prejudice." Guess said, "Yeah, I want to file a *Marsden*. Let me be heard on a *Marsden*. I need to be heard on a *Marsden*." Judge Clarke responded, "Tomorrow morning, if you get the early bus tomorrow morning—" Guess interrupted: "When I file my appeal, I need all of this on the record. I have got a writ of mandate going on right now. I want to file a writ of habeas. You know, this is very prejudice [*sic*]. You won't let me go and move my trial and let me do this. No, you are taking this all from me. You are telling me I can't—I have a right to these motions and I can't be heard on my motions? . . . What kind of stuff is that?"

The court asked defense counsel if Guess had considered the prosecution's offer to resolve the case. Guess interjected, "Bring in these trial people. Bring in these trial people. We're

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<sup>5</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

going to play this game. You all want to play this game.” Guess complained the offer was “not an offer,” adding, “What, do I look dumb? Dumb isn’t written across my forehead.”

Judge Clarke asked defense counsel if he had any motions. Guess said, “Come on, man. Yeah, I have a bunch of pretrial motions.” Defense counsel stated his only motion was to bifurcate Guess’s priors. The court granted that motion.

The court admonished Guess not to speak out in the jurors’ presence. Guess responded, “If you all want to have a trial without me, go ahead and do it. I want to be present for my trial. I just want to be pro. per. I just want to be fighting my own case. I just want to be able to have my private investigator . . . and I will fight my own trial. I didn’t ask for a lawyer. I did not want a lawyer. I am objecting to having this lawyer, any lawyer, because I can do this myself.” Guess continued to assert he wanted to represent himself and have his “motions” heard, including a motion to suppress “[e]verything.”

Eventually, Judge Clarke told Guess, “So we’re going to bring the jurors in, the first 20. They’re going to be sworn. I will talk to them for a while. So you will have a lot of time to think about this, you and your lawyer.” The court again admonished Guess not to “speak out in front of the jury.” Guess responded, “Well, just take me from the room now because—.” The court said, “If you want to leave the room now and not be present, just tell your lawyer that you are giving up your right—.” Guess interrupted: “He’s not my lawyer; he’s not my lawyer; he’s not my lawyer. It is a conflict of interest when I ask him to argue motions, motions that I have for—my pretrial motions, and he doesn’t really want to do that, then there is no reason for him to represent me.”

Guess continued to argue with the court, stating he would stay in the courtroom only if the court allowed him to represent

himself. The court then said, “Here’s what I will consider: if you come tomorrow morning, show you are not playing games with the sheriffs, come tomorrow morning and tell me you want to start the trial by picking the jury, I will consider it. But this [demand to have pretrial motions heard] looks to me like a delay on your part.” Guess nevertheless continued to argue with the court. Finally, the court told Guess his demand to represent himself was denied.

Guess then said, “I want to be heard on a *Marsden* hearing.” Judge Clarke replied, “Later.” Guess asked, “What’s later?” The court stated Guess should tell him later why he didn’t raise the issue when everyone announced ready for trial in Judge Guzman’s court. The court said the jurors would be brought in. Guess said, “You can take me out right now.” Judge Clarke asked Guess if he wanted to leave the room and Guess replied, “Yep.”

The prospective jurors entered the courtroom and jury selection commenced. At the afternoon break, the court said, “I would like to have Mr. Guess back . . . to give him another chance to rejoin us.” About 15 minutes later, the bailiff reported to the judge and counsel that he had gone to see Guess several times. The bailiff asked Guess if he wanted to come back into the courtroom. Guess first said, “I am not going to answer you,” and then “ignored” the bailiff’s further inquiries. Judge Clarke asked defense counsel if he wanted the court “to do anything further regarding Mr. Guess’[s] presence” and counsel replied, “No, Your Honor.” The court—having reviewed the court file—observed that Guess’s attempts “to disrupt these proceedings” was “not new,” and noted it would order him extracted for the next morning’s proceedings. Jury selection continued.

After the court excused the prospective jurors for the day, the court discussed a number of matters with counsel. Just

before the court recessed, defense counsel said, “[Y]our Honor, on an unrelated topic on Mr. Guess’[s] request for a *Marsden*, obviously I will be here—.” The court replied, “It is better if he’s here. If he wants to make such a request, he can. But I would rather not have him talk about it without you here or you talk about it without him here. So if *Marsden* comes up, it would be with both of you in the room and nobody else.” The court concluded, “[W]e’ll see if he makes it on the early bus.”

The next morning, Guess did not come to court. Judge Clarke informed counsel that Guess was “being specially transported by the sheriffs . . . but his arrival time [was] uncertain.” The court displayed a video for counsel that showed Guess refusing to come out of his cell at the jail. The court stated, “The audio and video combined show me by clear and convincing evidence that Mr. Guess has voluntarily absented himself from this trial, which is, of course, consistent with his behavior on many, many, many prior occasions and something I warned him about. I am hoping that he will change his mind and come into court when the sheriffs bring him.” The court noted it was “unfair to the jurors to wait for Mr. Guess.” Jury selection continued without objection by defense counsel.

When the jurors later took a break, Judge Clarke told counsel, “Mr. Guess is now in the building, but refusing to come upstairs.” Guess had told the bailiff “he would not come upstairs unless he was granted pro. per. status.” Jury selection continued without Guess.

The court excused the jurors for lunch, then told defense counsel that the bailiff reported Guess was “interested in talking to” counsel. The court asked defense counsel to speak with Guess over the lunch recess. The court noted, “Obviously your client should understand that I can’t hear what he has to say or talk to him unless he is here in my presence. . . . Maybe if he comes

at least up to the lockup, I can talk to him there. Maybe you can convince him to cooperate and you can certainly tell him that I left some time before the jury comes back to listen to what he might have to say.” Defense counsel assured the court he’d speak with Guess during the lunch recess.

When the court reconvened after lunch, Guess was present, dressed in civilian clothes. Judge Clarke told Guess, “I know that you chose not to come today even though you were told you should come.” The court explained the trial had proceeded in Guess’s absence and urged him to stay. Guess said, “I wanted to be heard. Can I be heard?” The court ordered Guess uncuffed and then asked him, “Your hands are free. What did you want to tell me, Mr. Guess?”

Guess replied he’d been depressed “for like the last two weeks” and had had a tooth pulled. The day before, he said, he “was trying to get across to get my pro. per. status back so I can fight my case.” Judge Clarke asked Guess if he was prepared to give an opening statement and Guess said, “No.” The court told Guess he could give it at the conclusion of the People’s case if he wished and he could share it with defense counsel so counsel could “blend it with his statement if he thinks it makes sense.”

The court then brought in the jury. Guess did not bring up the issue of his representation again, nor did he ask to be heard on his earlier *Marsden* motion.

#### **4. *The verdicts and sentence***

The jury convicted Guess of felony evading, shoplifting, and receiving stolen property.<sup>6</sup> Following a jury trial on Guess’s

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<sup>6</sup> The jury was unable to reach a verdict on the theft of identifying information count, and the court granted the prosecution’s motion to dismiss it.

priors, the jury found the allegations of Guess's strike prior and three prison priors true.

The court sentenced Guess to seven years in the state prison on the evading count. The court chose the upper term of three years, doubled because of the strike, plus one year for one of the prison priors. The court imposed and stayed the remaining two prison priors under section 654. On the shoplifting count, the court sentenced Guess to 180 days in the county jail, concurrent with the felony count. On the receiving stolen property count, the court sentenced Guess to 364 days in the county jail, consecutive to the felony count. The court stated Guess could serve his county jail time in any penal institution.

The court ordered Guess to pay a restitution fine of \$2,000 under section 1202.4, subdivision (b), court operations assessments of \$120 (\$40 per count) under section 1465.8, subdivision (a)(1), and criminal conviction assessments of \$90 (\$30 per count) under Government Code section 70373. The court stayed a parole revocation restitution fine in the same amount as the restitution fine. Guess did not object to the restitution fines or court assessments nor did he assert any inability to pay them.

## **DISCUSSION**

### **1. *Guess abandoned his Marsden motion***

Guess contends the court violated his constitutional rights by "fail[ing] to conduct a *Marsden* hearing."

*People v. Marsden* (1970) 2 Cal.3d 118 established the right of a defendant personally to raise the issue of ineffective assistance of counsel by means of a motion to discharge his attorney and appoint a new one. The defendant is entitled to relief on a showing that the first appointed attorney is not providing adequate representation or that the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v.*

*Fierro* (1991) 1 Cal.4th 173, 204.) Because a criminal defendant is entitled to competent representation at all times, the trial judge should appoint substitute counsel for a defendant when a proper showing has been made at any stage of the proceedings. (*People v. Smith* (1993) 6 Cal.4th 684, 694.)

The Attorney General contends Guess “abandoned his *Marsden* request” by “absent[ing] himself from court at the time his hearing was to take place” and failing to “reiterate[ ] his supposed demand for a hearing.” We agree.

In *People v. Vera* (2004) 122 Cal.App.4th 970 (*Vera*), defendant Vera pled to a felony but then “expressed dissatisfaction with the performance of his public defender.” (*Id.* at p. 973.) In the prosecutor’s absence, the court asked Vera why he was dissatisfied. Vera listed a number of things his lawyer had failed to “investigate.” The court told Vera it would give his counsel “an opportunity to do what you have suggested here,” advised Vera to talk with his counsel “meanwhile,” and denied the *Marsden* motion. Vera said he wasn’t finished and had more complaints. The court replied it had a jury arriving imminently on another case and Vera could renew the motion if he wished. (*Vera*, at pp. 975-976.) Vera did not raise the issue again. (*Id.* at p. 977.)

The Court of Appeal held that, while *Marsden* requires a court “to inquire into all of a defendant’s complaints about his appointed counsel, the inquiry need not occur at a single hearing.” (*Vera, supra*, 122 Cal.App.4th at p. 981.) The appellate court noted the trial court had “afforded [Vera] a later opportunity to articulate his yet-unstated complaints” and Vera’s “failure to take advantage of this offer can only be interpreted as an abandonment of his unstated complaints.” (*Ibid.*) Citing authority that “a defendant’s conduct may amount to an abandonment of a request to represent himself under *Faretta*,”

the court concluded, “If a defendant can abandon his request to substitute himself for counsel, [he] can abandon his request to substitute another counsel.” (*Id.* at p. 982, citing *People v. Kenner* (1990) 223 Cal.App.3d 56, 60-62; *People v. Skaggs* (1996) 44 Cal.App.4th 1, 7-8.)

In *People v. Jones* (2012) 210 Cal.App.4th 355 (*Jones*), defendant Jones made a *Marsden* motion. After a hearing the court denied it. About seven months later, Jones filed a second *Marsden* motion. The court said it would hear the motion on the next date, about two weeks away. (*Jones*, at pp. 359-360.) The case then was continued a number of times. Jones never raised the issue again. (*Id.* at pp. 360-362.)

The Court of Appeal concluded Jones had abandoned his demand for new counsel. The court stated the “general rule of forfeiture by abandonment” “applies fully to the facts of this case. [Jones] had the duty of bringing his motion to the trial court’s attention at a time when the oversight could have been rectified.” (*Jones, supra*, 210 Cal.App.4th at p. 362.)

Guess argues *Vera* and *Jones* are distinguishable because in *Jones* the court’s failure to conduct the *Marsden* hearing was inadvertent, while here it was “intentional,” and it was “perfectly reasonable” for Guess “to come to the . . . conclusion” that “raising the issue any further” would be “futil[e]” “given the trial court’s repeated rebuffs and challenges to the requests’ timeliness.” The record does not support Guess’s contention.

With jurors waiting, the court told Guess his request for a *Marsden* hearing would be handled “later.” Guess continued to demand to represent himself and then demanded to leave the courtroom. Guess refused to return to the courtroom at the afternoon break and for the rest of the afternoon. He also refused to come to court the next morning, even though the court had told him it would hear his *Marsden* motion that morning. Had Guess



not chosen to absent himself from the proceedings, he could have had his motion heard during the afternoon break on July 30, at the end of that day after jurors left, or the next morning before the jurors arrived. Moreover, when Guess finally decided to come back into the courtroom on the afternoon of July 31, he did not raise the issue of any replacement of counsel or say anything more about a “*Marsden* hearing.”

Indeed, Guess’s statements to the court make clear his complaint wasn’t with defense counsel.<sup>7</sup> Guess told Judge Clarke, “I did not want a lawyer. I am objecting to having this lawyer, *any lawyer*, because I can do this myself.” (Italics added.) Guess continued to insist on representing himself, even though he had failed and refused for weeks to comply with requirements as simple as coming to court for his court dates. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 155-157 [court not required to conduct *Marsden* hearing after defendant complained “‘I feel I’m not getting a defense’” because he “expressed in no uncertain terms . . . his desire to act as his own attorney”].) In any event, even assuming Guess’s statements that he wanted “a *Marsden* hearing” constituted not a *Faretta* motion in disguise but a true *Marsden* motion, Guess abandoned any request to replace counsel by refusing to come into the courtroom, “‘failing to press for a hearing,’” and apparently “‘acquiescing in the court’s failure

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<sup>7</sup> The only complaint Guess made about defense counsel in open court was that counsel had not pursued Guess’s section 995 and suppression motions. “There is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant.” (*People v. Lucky* (1988) 45 Cal.3d 259, 281-282.)

to hear the [*Marsden*] motion.’ ” (*Jones, supra*, 210 Cal.App.4th at p. 361.)<sup>8</sup>

**2. *Guess has forfeited his challenge to the restitution fines and court assessments***

As noted, without objection, the trial court imposed a restitution fine of \$2,000, a suspended parole revocation restitution fine in the same amount, \$90 (\$30 per count) in criminal conviction assessments, and \$120 (\$40 per count) in court operations assessments. Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Guess contends imposition of these fines and fees, without consideration of his ability to pay, violated his due process rights. Therefore, he asserts, we should remand the matter for an ability-to-pay hearing.

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<sup>8</sup> Guess cites *People v. Armijo* (2017) 10 Cal.App.5th 1171. That case was different. Defendant Armijo sent the court a letter complaining about his public defender and asking the court to appoint new counsel to replace her. Five days later, Armijo came to court and entered into a plea agreement. The Court of Appeal conditionally reversed Armijo’s conviction. The court stated, “[O]nce the defendant clearly indicates to the trial court a request for the discharge and replacement of appointed counsel, the court must hold a hearing to allow the defendant to explain the basis for the request.” (*Id.* at p. 1179.) The court distinguished *Vera*, noting in that case Vera “failed to take advantage of . . . the opportunity to explain his request” for new counsel after being afforded the opportunity to do so. (*Id.* at p. 1182.) Here, by contrast, Guess never “clearly indicate[d]” he wanted a different lawyer; to the contrary, he repeatedly insisted he didn’t want a lawyer at all and wanted to be his own lawyer. Moreover, the court said it would discuss the matter “later,” to avoid yet more waiting for the jurors, but Guess insisted on leaving the courtroom and refused to return the next morning, a time the court specifically identified for Guess to be heard further.

*Dueñas* held that due process requires a trial court to conduct an ability-to-pay hearing and determine a defendant's ability to pay before imposing assessments under section 1465.8 and Government Code section 70373, and before executing a restitution fine under section 1202.4. (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) Our Supreme Court is currently considering the issue of whether a trial court must consider a defendant's ability to pay before imposing or executing fines, fees, or assessments and, if so, which party bears the burden of proof. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.)

Guess's claim fails because he has forfeited any challenge to the fines and fees imposed. When the trial court imposed the restitution fines and assessments, Guess did not object or assert he was indigent and unable to pay. Section 1202.4, subdivision (d), allows a court to consider a defendant's inability to pay if it imposes a restitution fine greater than the minimum amount of \$300. (*People v. Avila* (2009) 46 Cal.4th 680, 729; § 1202.4, subds. (b)(1) & (d).) Because the court imposed more than the minimum fine, to preserve the issue for appeal Guess was obliged to object and demonstrate his inability to pay an amount greater than the \$300 minimum. Thus, although sentencing took place before *Dueñas* was decided, an objection to the \$2,000 fine would not have been futile under the governing law at the time. (§ 1202.4, subd. (d); see *People v. Smith* (2020) 46 Cal.App.5th 375, 394-395; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1073-1074; *People v. Torres* (2019) 39 Cal.App.5th 849, 860; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 463-464; *People v. Gamache* (2010) 48 Cal.4th 347, 409; *People v. Nelson* (2011) 51 Cal.4th 198, 227.) By failing to object that he lacked the ability to pay the \$2,000 restitution fine, Guess also has forfeited his challenge

to the much lower court operations and criminal conviction assessments.

**3. *Guess's one-year prior prison enhancements must be stricken***

As noted, the jury found true the People's allegation that Guess had served three prior prison terms within the meaning of section 667.5, subdivision (b). The court imposed one year for each of the three but stayed two of those. In November 2019, Guess filed a supplemental letter brief, contending the prison priors must be stricken under SB 136, which took effect on January 1, 2020. The Attorney General agrees SB 136 applies to Guess.

On October 8, 2019, the Governor signed SB 136 into law. Under the bill's amendment to section 667.5, subdivision (b), a one-year prior prison term enhancement applies only if the defendant served the prison term for a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b). (See Stats. 2019, ch. 590, § 1.) (*People v. Lopez* (2019) 42 Cal.App.5th 337, 340-341 (*Lopez*).) The amended statute applies to defendants whose cases are not yet final. (*Lopez*, at pp. 341-342; *People v. Gastelum* (2020) 45 Cal.App.5th 757, 772-773 (*Gastelum*).) None of Guess's three prison priors was for a sexually violent offense. Accordingly, we order them stricken.<sup>9</sup>

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<sup>9</sup> The Attorney General contends we should remand the case for resentencing. However, when the trial court has imposed the maximum possible sentence, there is no need for the court again to exercise its sentencing discretion. (*Lopez, supra*, 42 Cal.App.5th at p. 342; *Gastelum, supra*, 45 Cal.App.5th at pp. 772-773.) Here, the trial court chose the upper term, doubled it because of Guess's strike, and ordered his 364 days for the receiving stolen property misdemeanor to run consecutively

### **DISPOSITION**

We modify the judgment to strike Guess's three one-year prior prison term enhancements and, as modified, affirm the judgment of conviction. The trial court is to prepare an amended abstract of judgment and to forward a certified copy to the California Department of Corrections and Rehabilitation.

### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.

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to the felony term. Except for ordering the 180 days in the county jail on the shoplifting count to run concurrently, the court imposed the maximum sentence.